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FEDERAL COMMUNICATIONS COMMISSION  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

In the Matter of )  
 )  
Tariff Filing Requirements ) CC Docket No. 93-36  
For Nondominant Common )  
Carriers )

To: The Federal Communications Commission

**REPLY COMMENTS OF SOUTHWESTERN BELL CORPORATION  
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

Southwestern Bell Corporation ("SBC") respectfully submits these Comments in reply to the initial comments filed by various parties in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding. SBC generally supports the Commission's initiative to streamline tariff filing requirements and find them lawful, but only insofar as the requirements are applied uniformly to all similarly situated carriers. As in the Initial Comments, SBC urges the Commission to apply streamlined tariff filing regulation to all carriers which provide a service which is subject to competition.

I. **BOTH PUBLIC POLICY AND THE LAW OF THE UNITED STATES REQUIRE  
UNIFORM TREATMENT OF MARKET PARTICIPANTS.**

In its Competitive Carrier Proceeding, completed in 1985, the FCC concluded that tariff regulation in the presence of competition is not only unnecessary but actually harmful to competition since customers faced with unreasonable or discriminatory rates can simply move to other providers. Thus,

any tariff requirements would impede that easy transition to a competitor and slow the dynamic forces of the marketplace. The Commission concluded in that case that the availability of alternative providers acts as an adequate substitute for tariff regulation. The Commission's NPRM herein, however, arbitrarily limits this conclusion to so-called "non-dominant" carriers, without analyzing whether the same forces could satisfactorily substitute for tariff regulation of "dominant" carriers. Logically the conclusion must apply to all providers. Minimizing business and tariff regulation for all carriers who provide a service in a competitive market serves the public interest and should not be limited to selective providers in that market.

Commenters such as MCI disagree, arguing instead that dominant and non-dominant carriers are not similarly situated and, therefore, should not be similarly treated.<sup>1</sup> MCI's argument, however, is internally inconsistent. If customer movement within a market with competitive alternatives constrains "nondominant" carrier action, it should have the same effect on "dominant" carriers. Indeed, these customers must be moving from one such provider to the other, and the arbitrary categorization of a carrier as either "dominant" or "non-dominant" does not prevent this customer movement. This concept of "competition on the fringe" is the very reason why the Commission concluded that minimal price information will be adequate to satisfy the requirements of Section 203(a) of the Communications Act.

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<sup>1</sup>Initial Comments of MCI at p. 14.

The Commission's initial decision classifying carriers into "dominant" (i.e., local exchange companies and AT&T) and "non-dominant" carriers (i.e., everyone else) is a decision over ten years old and based on a "pre-divestiture" market considerably different than that which exists today. Ongoing decisions by the Commission designed to encourage competition have combined with rapidly evolving technology to create an environment of alternatives which could not have been contemplated by the Commission a decade ago. The Commission's decisions concerning expanded interconnection for access services in particular will have a far reaching impact on the competitive nature of the local exchange market. Whatever one's views of the prudence or legality of those decisions, they effectively remove all barriers to competition in the local exchange marketplace. In the few years that competitive access providers have operated, they have become well established, with substantial financial backing. For example, in its Initial Comments in this proceeding, Metropolitan Fiber Systems ("MFS") characterized itself as an entity owning subsidiaries which "provide competitive access services over fiber ring networks in fourteen major metropolitan markets across the country."<sup>2</sup> (Emphasis supplied.)

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<sup>2</sup>MFS Communications Company, Inc., Comments on the Notice of Proposed Rulemaking, at p. 1.

A. PUBLIC POLICY REQUIRES THAT ALL PROVIDERS OF A SERVICE SUBJECT TO COMPETITION BE REGULATED UNIFORMLY AND THAT TARIFF REGULATION BE STREAMLINED FOR SERVICES SUBJECT TO SUCH COMPETITION.

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Moreover, the Commission's classification of local exchange companies and AT&T as "dominant" was not based on a quantitative analysis of market power. Rather, the Commission determined that because of their affiliation and predominant incumbency, AT&T and the Bell Operating Companies should be classified as dominant carriers. The Commission did not, and to date has not, established any provision for reclassifying carriers or reassessing these classifications. As SBC detailed in its Initial Comments, this lack of supporting analysis and data for the disparate treatment of so-called "dominant" and "non-dominant" carriers is not only unlawful, it does not serve the public interest,<sup>3</sup> if it ever did. As the Commission pointed out in its NPRM in this case, detailed tariff regulation of carriers providing services which are subject to competition actually impedes that competition by creating significant regulatory lag.<sup>4</sup>

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<sup>3</sup>"[W]e see regulation as introducing risk . . . I resent the fact that regulation prevents me from dealing with a willing supplier on terms we can agree on . . . there should be competition, but also equal treatment of competitors. If there's not that equal treatment, then customers feel the bite." See, Free to Compete: Customer Needs in the Provision of the Public Network; Comments of General Dynamics, Section 3, p. 13. Also, see generally, Comments of Banc One, Corp., and Tyson Foods, Inc., pp. 13, 14.

<sup>4</sup>SBC has proposed that the market area classification process outlined in USTA's Interstate Access Reform Proposal could be used to tailor the degree of regulatory oversight to the competitiveness of each market area. The USTA proposal submitted

B.     CONSTITUTIONAL AND STATUTORY LAW REQUIRE THAT  
STREAMLINED TARIFF REGULATION BE APPLIED TO ALL  
CARRIERS WHICH PROVIDE THE SAME SERVICE.

As will be detailed in Section II below, SBC supports the notion that the FCC has the power to streamline most of its tariff regulations despite the Circuit Court of Appeals decision in AT&T v. FCC. Subject only to the provision that the FCC does not completely negate a statutory requirement, the Commission is given wide discretion to make modifications. This discretion comes both from the expressed language of the Act and judicial interpretation of that section.<sup>5</sup> Another important limitation on the FCC's power to streamline, however, is whether the Commission extends the modification to all similarly situated carriers.

In this respect, the FCC's requirements do not differ appreciably from those otherwise imposed upon the carrier. Common carriers are required to refrain from engaging in discrimination among their customers and to provide the same

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specific behavioral criteria to be used to assess the competitive nature of each market area. See Southwestern Bell Telephone Company Reply Comments, CC Docket No. 91-213, (released March 19, 1993); see also USTA Reply Comments, CC Docket No. 91-141, Phase I (released February 19, 1993). This analysis would give content to the distinctions in tariff regulation to which the Commission seems committed and additionally would allow the Commission to marshal judiciously its limited administrative resources.

<sup>5</sup>Section 203(b)(2) states that: "[t]he Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances." Similarly, MCI Telecommunications Corporation v. FCC, 765 F.2d 1186, 1192 (D.C. Cir. 1985) held that Congress gave the Commission the ability to make "circumscribed alterations" to the requirements in Section 203.

services under the same terms and conditions to similarly situated customers. The equal protection and due process clauses of the United States Constitution similarly constrain the actions of the FCC in streamlining regulation. Once one determines that the statute allows the Commission to engage in a particular modification of a statutory or regulatory requirement, one must ascertain whether that restriction is properly tailored so as to encompass all similarly situated carriers.

For the reasons discussed in Section A above and in SBC's Initial Comments in this case, the streamlined regulation proposals made by the FCC in its NPRM herein do not pass such scrutiny. Equal protection is denied when persons engaged in the same business are subjected to different restrictions or granted different privileges.<sup>6</sup> Such a conclusion equally applies where the law is not equally enforced or is unevenly applied. Therefore, the FCC's statutory authority to streamline or modify tariff regulation can be exercised only if such actions are evenly applied to carriers engaged in similar enterprises. It should be obvious from even a cursory review of the text of the NPRM that the Commission has not engaged in such an analysis vis-a-vis its bifurcation of carriers into dominant and non-dominant camps. Therefore, the distinction will not withstand constitutional scrutiny.

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<sup>6</sup>The RCC would not propose to regulate two cellular carriers operating in the same MSA or RSA differently. The Commission should be just as reluctant to regulate differently two providers of local exchange services in the same service area.

II. REGARDLESS OF THE COMMISSION'S DECISION TO STREAMLINE REGULATION FOR OTHER MARKETS, SUBSTANTIAL REASONS UNDER THE COMMUNICATIONS ACT ARGUE FOR MAXIMUM STREAMLINING OF REGULATION FOR CELLULAR CARRIERS.

In its Initial Comments, SBC argued that Title III of the Communications Act grants the FCC more discretion in radio matters than in other matters, a point not reached by the D.C. Circuit Court of Appeals Decision in AT&T v. FCC. Given this additional discretion, and because cellular service is competitive and was created at the outset to be so, tariff regulation is unwarranted. Despite these obvious facts, Pacific Telesis urges the Commission to scrutinize the wireless market to determine whether customers have a meaningful choice of suppliers in this market.<sup>7</sup> Such an inquiry is not necessary and would be a poor use of the Commission's scarce resources. In Docket No. 85-89 the Commission found that the radio services market is competitive and that tariff regulation of such services is "not necessary to assure that [such] communications services are readily available and reasonably priced."<sup>8</sup> Moreover, when the cellular market was created, the FCC licensed two carriers in each market area to ensure a vigorously competitive arena.

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<sup>7</sup>Initial Comments of Pacific Telesis Companies at p. 17.

<sup>8</sup>In the Matter of Preemption of State Entry Regulation In The Public Land Mobile Service, 69 R.R.2d (PNF) 1518 (1986), paras. 1, 33; vacated on state preemption issue, National Association of Regulatory Utility Commissioners v. FCC, (86-1205), 1987 U.S. App. Lexis 17810 (D.C. Cir. 1987); Memorandum, Opinion and Order, CC Docket No. 85-89 (released October 21, 1987).

Thus, unlike all other types of telecommunications services to date, cellular service was born competitive. The wisdom of this decision and its favorable impact on competitiveness of the market for these services should now be obvious. The absence of rate and tariff regulation for cellular carriers has allowed such carriers to engage in price competition and competitive bidding, to provide service innovation and to respond quickly to market trends. Pacific Telesis has not and cannot dispute these facts. Furthermore, the level of competition in the cellular market will increase with the entry of additional wireless services such as personal communications services ("PCS") and enhanced specialized mobile radio services, which will provide services much like traditional cellular service. Thus, an examination of the cellular market as suggested by Pacific Telesis is not necessary. The competitive environment contemplated by the Commission, when it established the cellular market, clearly exists today. Customers indeed have



to allow banded rates and maximum rates. So long as the Commission does not impose disparate tariff filing requirements on providers of like services, SBC disagrees with those who would circumscribe the Commission's power so narrowly.

A. ONE DAY NOTICE OF FILING IS PERMISSIBLE.

NYNEX argues that reducing the tariff notice period to a single day will result in less effective monitoring of tariff filings and will shift the burden of reviewing tariffs filed by non-dominant carriers to customers and competitors.<sup>9</sup> Such a result, however, is likely to occur whether the notice period is 14 days, 1 day, or 60 days. Given its limited resources, the Commission is likely to subject tariffs provided by a number of alternate suppliers to less significant scrutiny. The Commission reasonably relies upon self interest to motivate customers and competitors to perform such review.

Moreover, as the FCC points out, longer review periods only give shelter to less aggressive competitors to meet the innovative proposal of their competitors. While Mobile Marine Radio, Inc. ("MMR") would limit the authority of Southern Motor Carriers Rate Conference v. U.S. to supporting a one day notice for rate decreases only, such a limitation exists neither in the Communications Act nor in the text of that judicial decision. While Southern Motor Carriers specifically addressed only a rate

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<sup>9</sup>Initial Comments of NYNEX at pp. 9-10. The Comments of NYNEX are ironic in light of continued support by NYNEX Mobile for one day notice provisions for state tariff filings in Massachusetts.

decrease scenario, its logic is not limited to decrease the Interstate Commerce Commission. The limitations applied by the ICC to its own rules, of course, do not apply to the FCC either by statute or rule.

B. BANDED RATES AND MAXIMUM RATES ARE ALLOWED BY THE COMMUNICATIONS ACT.

SBC supports the Commission's authority to adopt ranges of rates and maximum rate filing requirements, so long as these provisions are applied to all companies who provide services subject to that rule. A number of carriers, including the Pacific Companies, NTCA, and AT&T disagree, however. Their arguments ignore the significant discretion which the FCC has in interpreting this language. AT&T v. FCC made clear to the Commission that a tariff which indicates to customers what charge will be assessed to them for particular service must be filed. No one, however, has argued that the same rate must apply to all

statements that would be made from any company. Rather, a

different than the range of rates and maximum rates which the Commission has proposed to allow for streamlined tariffs. So long as the tariff allows the customer to discern a rate which it may be charged for the service, the language of the statute requiring that the carrier charge only the rate listed in the tariff is satisfied. Similarly, if the company specifies that it will charge rates between X and Y, "all charges" are displayed in the tariff as required by Section 203. Filing ranges also satisfy the requirement to show maximum rates, since the upper limit of the range, by default, also represents the maximum rate that can be charged.

Section 202(a) clearly states that unreasonable discrimination in charges for like communications services is prohibited. As the Competitive Telecommunications Association ("ComTel") commented <sup>10</sup> if a carrier files a tariff containing a

SBC agrees with Sprint that, contrary to allegations of AT&T, the decision by the United States Court of Appeals for the District of Columbia in Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986), does not prevent the Commission from permitting maximum rates or ranges of rates. As SBC pointed out in its Initial Comments, application of precedent decided under the Interstate Commerce Act to actions of the FCC is not automatic. Even though Section 203 of the Communications Act is similar to the tariffing provisions of

Thus, it is understandable that the D.C. Circuit has often held, as it did in Sea-land Service v. ICC, 738 F.2d 1311, 1318 n.11 (1984) that precedent under the Interstate Commerce Act may be useful to issues before the FCC "by way of analogy only." Similarly, the decision which gave rise to this NPRM, AT&T v. FCC makes no mention of case law interpreting the Interstate Commerce Act.

SBC agrees with Sprint that maximum rate tariffs and ranges of rates serve the dual purposes of tariffs, which are to (1) enable the Commission to ensure that only just, reasonable amounts to not unduly discriminatory rates are charged to customers and (2) allow customers to be assured that they pay only reasonable rates. For these reasons, AT&T and the other opposing commenters are simply wrong when they suggest that tariffs which use ranges of rates or maximum rates are unlawful.


#### IV. CONCLUSION.

Streamlined regulation is necessary to enhance competition and to improve the efficiency of the governmental process itself. The power of government should never be employed where natural and private forces are adequate. This proceeding provides the perfect opportunity for the Commission to take the next logical step from its prior success with streamlined regulation and apply it quite consistently, service by service, to all carriers which provide that service. Only in this manner can the mandate of the District of Columbia Court of Appeals and the provisions of the United States Constitution be harmonized

with the needs of the telecommunications market and the American consumer. SBC urges the Commission to adopt a final rule which streamlines tariff filing requirements for all providers of any service which is subject to competition and that it pay special attention to alleviating the regulatory burden placed upon cellular carriers as a result of the Court's decision.

Respectfully submitted,

SOUTHWESTERN BELL CORPORATION

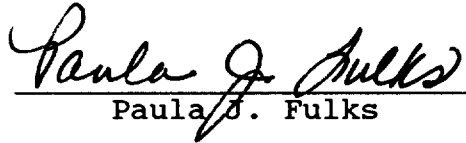
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April 19, 1993

CERTIFICATE OF SERVICE

I, Paula J Fulks, hereby certify that copies of the foregoing Reply Comments Of Southwestern Bell Corporation have been served by first class United States mail, postage prepaid, on the parties listed on the attached.

  
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